

Title	Appellate Rules: Preparation of Pretrial Records in Death Penalty Cases (amend rule 39.52, Cal. Rules of Court)
Summary	The proposed amendments would update rule 39.52 in light of trial court unification. Rule 39.52 addresses death penalty case record preparation for hearings prior to and including the preliminary hearing.
Source	Criminal Law Advisory Committee
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Discussion	<p>Rule 39.52 provides for uniform record preparation procedures in death penalty cases prior to trial. It addresses the preparation of the record of municipal court proceedings. The current version of the rule has not been updated in light of unification and does not make sense in a unified court.</p> <p>The proposed amendments include replacing language requiring preparation of transcripts from municipal court proceedings with language requiring preparation of transcripts of proceedings “prior to and including the preliminary hearing.” This follows language used by the Legislature in a similar situation. (See Pen. Code, § 190.9(a)(1).) References to “the municipal court judge” are also deleted; the proposed amended rule refers the “judge presiding at the preliminary hearing.” Other changes to the rule are mostly administrative in nature, chiefly defining record preparation and who is responsible to ensure the record is complete and timely prepared.</p> <p>Additional proposed amendments include two alternatives to subdivision (b)(2), which address when record preparation must begin. Penal Code section 190.9(a)(2) provides that court reporter shall begin “preparation of the record of all proceedings prior to and including the preliminary hearing” upon notification from the district attorney that the death penalty is being sought. Under the current version of the rule, that notice is deemed to be given “60 days before the first date set for trial” in the superior court if special circumstance have been charged. (Rule 39.52(b)(2) of the Calif. Rules of Court.)</p> <p>The first alternative simply updates the subdivision in light of unification.</p> <p>We are especially interested in receiving comments regarding the second alternative, as it makes a policy shift that may simplify record</p>

preparation. Under this version, transcripts in all special circumstances cases would automatically be prepared upon the filing of a complaint, information, or indictment alleging special circumstances, unless the district attorney affirmatively gives notice that he or she is not seeking the death penalty.

The reason for this second alternative is that it may be more efficient to immediately prepare transcripts in all special circumstances cases rather than to follow the current rule and wait until 60 days before the trial date. By the time notice to prepare the record has been given, a significant period of time has passed since the preliminary hearing and organizing record preparation can be a significant hardship. In light of this, it is possible that the costs of additional record preparation could be outweighed by the efficiency gained.

Attachment

Rule 39.52 of the California Rules of Court would be amended, effective January 1, 2002, to read:

Rule 39.52. Preparation and certification of transcripts of ~~municipal court~~ preliminary proceedings in death penalty cases

- (a) **[Application]** This rule applies to capital cases in the superior court, addressing the preparation and certification of transcripts of oral proceedings in a capital case prior to and including the preliminary hearing. Those transcripts in the municipal court in a capital case shall ~~must~~ be prepared and certified in accordance with Penal Code section 190.9(a) and the following procedures.
- (b) **[Notice to ~~municipal court to prepare record~~]** Upon receiving notification from the prosecution that the death penalty is being sought, the responsible superior court judge ~~shall~~ must enter that information on the record and ~~shall~~ notify the presiding judge and clerk of the ~~municipal court~~.
- (1) The responsible superior court judge is the judge assigned to try the case or, if none has been assigned, the presiding judge or a designee of the presiding judge.

ALTERNATIVE ONE

- (2) Notification from the prosecution to the superior court ~~shall be~~ is deemed to have been given, for the purposes of this rule only, 60 days before the first date set for trial on a charge of murder with special circumstances unless the prosecution has previously given notice that it does not intend to seek the death penalty.

ALTERNATIVE TWO

- (2) Notification from the prosecution ~~to the superior court shall be~~ is deemed to have been given, for the purposes of this rule only, ~~60 days before the first date set for trial on when the complaint,~~ information, or indictment includes a charge of murder with special circumstances unless the prosecution has previously given notice that it does not intend to seek the death penalty.
- (c) **[Assignment of judge]** Within five days of ~~Upon~~ receiving notification from the responsible superior court judge that the death penalty is being

sought, the presiding judge of the municipal court shall must assign to a the judge that presided at the preliminary hearing the responsibility for preparation of the record of all proceedings prior to and including the preliminary hearing the municipal court record in that case.

(d) [Notice to prepare transcripts; designation of primary reporter]

Within five days of ~~Upon~~ receiving notice that the death penalty is being sought, the municipal court clerk shall must promptly, and in any event within five days of receiving notice, notify each and every court reporter who has reported any hearing, conference, or proceeding in the municipal court prior to and including the preliminary hearing, whether in chambers or in open court, in the case. If there has been more than one reporter, the responsible municipal court judge presiding at the preliminary hearing may assign one reporter or other designee to perform the functions of the primary reporter as specified in rule 9(f).

(e) [Preparation and number of copies] Each reporter shall must prepare an original transcript and five paper copies of the proceedings in the manner and form required by rule 9, and two additional copies for each co-defendant against whom the prosecution is seeking the death penalty. A certificate attesting that the transcript is correct shall must be attached to each original and each paper copy.

This subdivision requires preparation of the transcript of the preliminary hearing unless that transcript has already been filed with the superior court for the purpose of including it in the superior court clerk's transcript.

(f) [Delivery of reporter's transcript] Within 20 days of notification by the clerk to prepre the reporter's transcript, ~~t~~The primary reporter or other designee, if one has been designated pursuant to subdivision (d), shall must deliver the original and all copies to the municipal court clerk promptly upon their completion, and in no event more than 20 days after notice by the clerk to prepare the reporter's transcript. Within five days of ~~Upon~~ receipt of the reporter's transcripts, the clerk shall must promptly, and in any event within five days, deliver the original of the reporter's transcript to the designated municipal court judge responsible for preparation of the record in the case, one copy to each defendant or, if the defendant is represented by counsel, to his or her trial attorney, and one copy to the prosecuting attorney. Confidential transcripts shall must be sealed and copies provided only to counsel for those parties who were present at the confidential proceeding.

1 (g) **[Review by Counsel]** To determine whether a request for corrections or
2 for additional transcripts or documents should be filed, trial counsel
3 ~~shall~~ must perform the tasks listed in paragraphs (g)(1) through (g)(4).
4 If a different attorney represented the defendant ~~in the municipal court~~
5 prior to or at the preliminary hearing, trial counsel ~~shall~~ must perform
6 those tasks to the best of his or her ability and the attorney who
7 appeared ~~in municipal court at the preliminary hearing~~ ~~shall~~ must also
8 perform those tasks.
9

10 (1) review the docket sheets to ensure that transcripts of all
11 proceedings have been made;
12

13 (2) examine the ~~municipal~~ court file to determine whether it is
14 complete;
15

16 (3) review porter's transcript; and
17

18 (4) consult with opposing counsel to determine whether all other
19 discussions have been properly transcribed.
20

21 (h) **[Declaration and request for corrections and additional transcripts]**
22 No later than 30 days after delivery of the transcripts, counsel for the
23 prosecution and for the defense ~~shall~~ must each file with the ~~municipal~~
24 court one of the following:
25

26 (1) A declaration stating that he or she has performed the tasks
27 required by subdivision (g) of this rule, or that they have been
28 performed under counsel's supervision. If trial counsel did not
29 represent the defendant at the preliminary hearing in municipal
30 ~~court~~, the attorney who represented the defendant at the
31 preliminary hearing in municipal court ~~shall~~ must also file a
32 declaration stating whether he or she performed the tasks required
33 by subdivision (g);
34

35 (2) A declaration as described in paragraph (h)(1) and a request for
36 corrections of or additions to the reporter's transcript or the
37 municipal court file; or
38

39 (3) A request for extension of time to file the declaration and request.
40

41 (i) **[Certification]** If any counsel fails to file the declaration or request for
42 extension of time as required by subdivision (h) of this rule, the court
43 ~~shall~~ must not certify the record and ~~shall~~ must use all reasonable means

1 to ensure compliance with this rule. The court ~~shall~~ must set the matter
2 for a hearing, require the attorney to show cause why he or she has not
3 complied with the rule, and set a date for the attorney to comply. If a
4 declaration is filed without a request for corrections or additions, the
5 designated ~~municipal court~~ judge ~~shall~~ must certify the record of the
6 ~~municipal court~~ proceedings prior to and including the preliminary
7 hearing as complete and correct. If one or more requests for corrections
8 or additions are filed, the following procedures ~~shall~~ must be followed:
9

- 10 (1) The designated ~~municipal court~~ judge ~~shall~~ must hold a hearing
11 within 15 days of the filing of the request and ~~shall~~ must make a
12 determination on all requests.
13
- 14 (2) The original reporter's transcript ~~shall~~ must be corrected to reflect
15 all corrections ordered. All corrections ~~shall~~ must be furnished to
16 the parties in the form of copies of corrected transcript pages.
17
- 18 (3) The corrected and additional transcripts and documents ~~shall~~ must
19 be delivered to the designated ~~municipal court~~ judge no later than
20 20 days after the hearing.
21
- 22 (4) The court may order further proceedings for correcting or
23 completing the record as needed.
24
- 25 (5) When the court's order has been satisfied, the judge ~~shall~~ must
26 certify that all objections have been determined and ~~that~~ must
27 notify the reporter to prepare the corrected transcripts ~~have been~~
28 ~~corrected in accordance with such determination.~~
29
- 30 (6) Once The reporter has been notified to prepare the corrected
31 transcripts under subdivision (i)(5), within 20 days he or she ~~shall~~
32 must provide six computer-readable copies of the transcript,
33 conforming to the requirements of Code of Civil Procedure section
34 269(c) and rule 35(b), and an additional computer-readable copy
35 for each co-defendant against whom the prosecution is seeking the
36 death penalty, each labeled to show the date on which the
37 computer-readable copy was made.
38

- 39 (j) **[Delivery to superior court]** No later than five days after the record has
40 been certified, the ~~municipal court~~ clerk ~~shall~~ must deliver to the
41 responsible superior court clerk-judge for inclusion in the superior court
42 record:
43

1 (1) the corrected and certified original ~~municipal court~~ reporter's
2 transcript and those copies that have not been distributed to
3 counsel, including the computer-readable copies, and
4

5 (2) the ~~municipal court~~ file or a certified copy of the ~~municipal court~~
6 file.
7

8 (k) **[Notice that death penalty is no longer being sought]** If at any time
9 the death penalty is no longer sought or available in a case in which the
10 presiding judge of the superior court has ~~notified the municipal court to~~
11 ~~begin-ordered~~ preparation of the certified record, the superior court
12 clerk ~~shall~~ must promptly notify the ~~municipal court clerk and~~ reporters
13 that the requirements under this rule no longer apply.
14

15 (l) **[Extension of time]** The ~~municipal court~~ may extend any of the time
16 periods specified by this rule for good cause only, but may not extend
17 the 120-day period specified in Penal Code section 190.9(a)(2) for
18 delivery of the ~~municipal court~~ record to the responsible superior court
19 judge.
20

21 (1) The ~~municipal court~~ may request an extension of the 120-day
22 period for delivery of the ~~municipal court~~ record by presenting to
23 the responsible superior court judge a declaration containing a
24 specific statement of reasons the time limits cannot be met.
25

26 (2) The responsible superior court judge ~~shall~~ must not extend the time
27 for more than an aggregate of 90 days except in an exceptional
28 case. If the ~~superior court~~ extends the time for more than 90 days,
29 it ~~shall~~ must state on the record its specific reasons for doing so.